No. 93-5256

In The

Supreme Court of the United States

October Term, 1993

FREDEL WILLIAMSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONER

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56 pp

QUESTIONS PRESENTED

I. Whether a post-arrest confession by an accomplice implicating a defendant, offered as an admission against penal interest of an unavailable declarant under Federal Rule of Evidence 804(b)(3), bears adequate indicia of reliability to render it admissible under Rule 804(b)(3) and the Sixth Amendment Confrontation Clause?

II. Whether a post-arrest confession by an accomplice implicating a defendant, offered as an admission against penal interest of an unavailable declarant under Federal Rule of Evidence 804(b)(3), constitutes a firmly rooted hearsay exception rendering it presumptively reliable and not subject to further analysis under the Sixth Amendment Confrontation Clause?

III. Whether 804(b)(3)'s requirement that a statement must be corroborated by circumstances clearly indicating its trustworthiness, is subject to the further requirement of *Idaho v. Wright*, 497 U.S. 805 (1990), that the only circumstances that can be considered are those surrounding the making of the statement?

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OPINION BELOW

The judgment of the United States Court of Appeals, Eleventh Circuit, is unpublished. J.A. 78. The evidentiary rulings by the district court, which the court of appeals affirmed, are also unpublished. J.A. 31-32, 35-36, 51-52.

JURISDICTION

The judgment under review was entered on December 23, 1992. J.A. 78. The Petitioner's Suggestion of Rehearing *En Banc* was denied on March 24, 1993. J.A. 79. On June 16, 1993, this Court granted Petitioner's Application for Extension of Time to File Petition for Writ of Certiorari to July 15, 1993. The Petition was timely filed and certiorari was granted on January 10, 1994. J.A. 80. Jurisdiction is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISION AND RULES INVOLVED

Confrontation Clause of the Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

Federal Rule of Evidence 801(c):

> **Hearsay**. "Hearsay" is a statement, other than one made by the declarant while testifying at

the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Federal Rule of Evidence 802:

Hearsay Rule. Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Federal Rule of Evidence 804(b)(3):

(b) **Hearsay exceptions**. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(3) **Statement against interest**. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

STATEMENT OF THE CASE

Fredel Williamson and Reginald Harris were charged in the Middle District of Georgia with conspiring to possess with intent to distribute cocaine, possession with intent to distribute cocaine, and interstate travel for the

purpose of promoting and carrying on the unlawful activity of distributing cocaine. J.A. 4-6. Harris had been stopped by a Georgia deputy sheriff after his vehicle veered off an interstate highway. Tr.80-83. He consented to a search of the vehicle, which resulted in the discovery of 19 kilograms of cocaine in two suitcases in the trunk. Tr.89-90, 93-95, 228. Harris was arrested, interrogated twice over the next several hours, and made various statements implicating himself and Williamson. J.A. 20-30, 33, 36-41, 43-44; Tr.94.

Prior to trial, the government moved to sever the defendants, recognizing that introduction of Harris's post-arrest statements would incriminate Williamson. J.A. 7; R.27. The government acknowledged that the introduction of Harris's statements would violate Williamson's Sixth Amendment rights. J.A. 7; R.27. The district judge granted the government's motion to sever. J.A. 7-8.

At Williamson's trial, the government called Harris as a witness. J.A. 9. Harris immediately invoked his Fifth Amendment privilege. J.A. 9. When he persisted in his refusal to testify after being granted immunity, the court held Harris in contempt. J.A. 14; R.50, 51, 52. Contrary to the position it had taken in requesting severance, the government then introduced Harris's post-arrest statements through DEA agent Walton. J.A. 15, 20-31, 33-34, 36-44. Williamson interposed timely hearsay and confrontation clause objections. J.A. 16-19, 34-36, 69-70. The district judge overruled all objections and related motions for mistrial. J.A. 31-32, 35-36, 51-52, 69-70.

The testimony established that after being in custody for approximately one hour and being advised that any

cooperation he provided would be relayed to the prosecuting attorney, Harris was interrogated telephonically by DEA agent Walton. J.A. 25-27, 33, 36, 52-53. The agent testified that during this interrogation, Harris told him that the cocaine seized from his vehicle was acquired by Williamson, that it belonged to Williamson, and that he (Harris) was supposed to drop it in a dumpster later that night in Atlanta. J.A. 37. Harris asked whether this conversation was being tape recorded. J.A. 25.

Harris was interrogated a second time by the agent, this time in person, after being in custody for approximately six and one-half hours. J.A. 22, 38, 43. Harris was again told that any cooperation he provided would be documented and relayed to the prosecutor. J.A. 26. The agent testified that this time Harris stated he had rented his automobile several days before and had driven it to Ft. Lauderdale, Florida, to meet Williamson. J.A. 38. Harris told him he acquired the cocaine in Ft. Lauderdale from a Cuban acquaintance of Williamson who placed the cocaine in the trunk and left written instructions on how to deliver it. J.A. 39.

When the agent pressed Harris to assist with a controlled delivery, Harris stated he had lied about the delivery to the trash dumpster, the pick-up from the Cuban, and the note regarding the delivery instructions. J.A. 39-40, 56. The agent testified that Harris now stated he was delivering the cocaine to Williamson in Atlanta, but that any controlled delivery would be impossible because Williamson had been travelling in front of him at the time of his arrest and would have observed the entire event. J.A. 40-41. Harris refused to provide any written statement. J.A. 24. Upon the conclusion of this interrogation,

Harris requested the assistance of an attorney. J.A. 24, 29-30.

The district court addressed Mr. Williamson's objections to admission of Harris's hearsay statements on at least three separate occasions. The court initially found the statements admissible reasoning that because the statements were voluntary, they necessarily were trustworthy and, thus, admissible under Rule 804(b)(3), and not contrary to Williamson's confrontation rights. J.A. 31. Addressing the issue a second time, the court confirmed its prior ruling, this time reasoning Harris's statements were admissible as co-conspirator hearsay statements. J.A. 35-36. Finally, the court ruled, specifically under Rule 804(b)(3), that the statements were admissible because Harris had implicated himself, was unavailable, and there existed "sufficient corroborating circumstances" to insure the trustworthiness of the statements. J.A. 51-52.

Harris's post-arrest statements were clearly the most damaging evidence against Williamson. The government's other evidence mainly consisted of items seized from Harris's rental vehicle including a piece of luggage which bore initials corresponding with Williamson's sister's name, Gov.Ex.7, Tr.93, 256, an envelope addressed to Williamson found inside the glove compartment, Gov.Ex.11, Tr.101, a receipt in the name of Williamson's girlfriend also found in the glove compartment, Gov.Ex.17, Tr.107-08, and the automobile rental agreement which listed Williamson as an additional driver. Gov.Exs.3, 5, Tr.84, 153, 301-05. No fingerprints of Mr. Williamson were found in the vehicle or upon any of its contents. Tr.112. The government also introduced, over objection, the testimony of a narcotics trafficker awaiting

sentencing on two federal indictments exposing him to a life without parole sentence. Tr.274-75, 284-87. This witness claimed he had sold cocaine to Williamson on 5 to 10 occasions, in amounts ranging from 10 to 20 kilograms, ending approximately 18 months before the events underlying the charges in the instant case. Tr. 275-78, 297.

The jury found Mr. Williamson guilty on all three counts. J.A. 71. The district court adjudicated him guilty and sentenced him to 327 months imprisonment. J.A. 71-73. He is presently in custody serving this sentence. The United States Court of Appeals, Eleventh Circuit, affirmed Williamson's conviction without opinion, J.A. 78, and denied rehearing. J.A. 79.[1] On January 10, 1994, this court granted Williamson's Petition for Writ of Certiorari and Motion for Leave to Proceed *In Forma Pauperis*. J.A. 80.

SUMMARY OF ARGUMENT

IA. The admission of Harris's post-arrest hearsay statements violated Williamson's Sixth Amendment right to confront his accuser. To comport with a defendant's Confrontation Clause rights, in addition to demonstrating

[1] While the case was pending on appeal, the government secured a remand to the district court to address its claim that Mr. Williamson had waived his confrontation rights by procuring Harris's silence at trial. R.96. Following an evidentiary hearing, the district court concluded that Mr. Williamson had not waived his confrontation rights. It also found, ironically, that Harris was not a credible witness. Tr.Nov. 26 & 27, 1991; R.111.

the declarant's unavailability, the government must demonstrate that the hearsay bears adequate indicia of reliability. *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980). Reliability can be inferred where the evidence falls within a firmly rooted hearsay exception. Otherwise, the evidence must be excluded absent a showing of particularized guarantees of trustworthiness. *Id.*

The post-arrest statement of a non-testifying alleged accomplice which incriminates the declarant and a criminal defendant does not constitute a firmly rooted hearsay exception. The hearsay exception for statements against interest has long been recognized but was traditionally limited to pecuniary and proprietary interests. Expansion to include statements against penal interest is recent. Particularly where such statements are elicited through custodial interrogation, this Court has repeatedly emphasized their suspect nature and the grave threat they pose to the reliability of the factfinding process. *See Lee v. Illinois*, 476 U.S. 530 (1986).

Federal Rule of Evidence 804(b)(3), the exception for statements against interest, includes statements against penal interest. However, its legislative history reflects that statements against penal interest which implicate the declarant and an accused were intended to be excluded from this exception. Although the language expressly excluding such statements was ultimately deleted, many decisions of the federal courts of appeals continue to hold that these statements are inherently unreliable and do not pass muster under the Confrontation Clause. For all of these reasons, these statements do not constitute a firmly rooted exception.

IB. Harris's post-arrest statements implicating Williamson do not bear adequate indicia of reliability to render them admissible under the Confrontation Clause. This Court observed in *Lee* that the "truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination." *Id.*, 476 U.S. at 541. This is due to the accomplice's "strong motivation to implicate the defendant" in order "to shift or spread blame, curry favor, avenge himself, or divert attention to another. . . . " *Id.* "[W]hen one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination." *Id.* at 451.

The facts of the instant case confirmed the presumptive unreliability of Harris's hearsay statements. The statements were made in response to custodial interrogation. They were made after Harris was advised that the prosecutor would be advised of any cooperation. Harris's statements minimized his own involvement and ascribed the bulk of the blame to Williamson. The statements were inconsistent. The totality of the circumstances surrounding Harris's statements failed to establish their trustworthiness.

IC. This Court should fashion a bright-line test excluding from a criminal defendant's separate trial, all post-arrest custodial statements which jointly incriminate the declarant and the defendant. This Court has expressed its doubt about the trustworthiness of such statements in the strongest terms. In practice, it has never

sanctioned their admission into evidence. In the context of joint trials of a non-testifying declarant and an incriminated defendant, this Court has consistently assumed that such statements are inadmissible against the defendant. Establishing a bright-line test excluding hearsay statements within this narrow but common class would add invaluable safeguards to the truthfinding function of trials and contribute substantially to the efficient administration of justice.

IIA. Harris's post-arrest statements inculpating Williamson were inadmissible as statements against interest under Federal Rule of Evidence 804(b)(3). Besides this Rule's express requirement that a proponent demonstrate the unavailability of the declarant and that the statement was against the declarant's penal interest, the Rule's legislative history reflects an implicit requirement that post-arrest incriminatory statements of non-testifying declarants be supported by particularized guarantees of trustworthiness. The standard is similar to the one expressly employed by the Rule which requires similar statements offered to exculpate a defendant to be corroborated by circumstances clearly indicating their trustworthiness. In the interests of simplicity and uniformity, this Court should require the government to establish circumstances clearly indicating trustworthiness to secure admission of inculpatory hearsay statements, too.

IIB. Harris's post-arrest statements implicating Williamson were inadmissible because they were not against Harris's penal interest. The justification for admitting such hearsay is that a reasonable person in the declarant's position would not make a statement against interest

unless it were true. The Rule does not address the situation where a declaration contains both self-serving and disserving parts. This Court's decision in *Lee*, as well as respected scholarly opinion, indicates that all self-serving parts of such statements should be excluded.

The portions of Harris's post-arrest statements inculpating Mr. Williamson were self-serving. They minimized Harris's role while characterizing Williamson as a principal. The statements were made after Harris was advised that his cooperation would be relayed to the prosecutor. Thus, the portions of his statements implicating Williamson should have been excluded.

IIC. Harris's post-arrest statements implicating Williamson were inadmissible because the government failed to establish corroborating circumstances clearly indicating their trustworthiness. These circumstances, according to this Court's decision in *Idaho v. Wright*, 497 U.S. 805 (1990), are limited to those immediately surrounding the making of the statement. Thus, the same circumstances that failed to establish trustworthiness under the Confrontation Clause similarly fail to establish trustworthiness under Rule 804(b)(3).

ARGUMENT

I. THE ADMISSION OF HARRIS'S POST-ARREST HEARSAY STATEMENTS VIOLATED WILLIAMSON'S SIXTH AMENDMENT RIGHT TO CONFRONT HIS ACCUSER.

Williamson's conviction rests upon the post-arrest hearsay statements of an uncross-examined alleged accomplice who implicated him under circumstances which this Court has repeatedly held are highly suspect and render such statements presumptively unreliable. The two statements were made after one hour and six and one-half hours in custody, respectively. They were made in response to police interrogation and upon repeated assurances that any cooperation would be relayed to the prosecutor. The statements were consistent only inasmuch as they minimized the claimed accomplice's involvement as a drug courier and maximized Williamson's involvement as the purchaser, owner, and intended recipient of the cocaine. They were, otherwise, contradictory. The declarant refused to give a written statement and was concerned about his oral statement being tape recorded. He had every possible incentive to wrongfully blame Williamson. These circumstances confirmed the presumptive unreliability of the hearsay. Admitting these statements into evidence violated Williamson's constitutional confrontation rights and compromised his right to a fair trial.

The Sixth Amendment's Confrontation Clause guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him. The main essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination."

Davis v. Alaska, 415 U.S. 308, 315-16 (1974) (quoting 5 J. WIGMORE, EVIDENCE § 1395 at 123 (3d ed. 1940)). "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in the expression of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of a fair trial which is this country's constitutional goal." *Pointer v. Texas*, 380 U.S. 400, 405 (1965).

The right to confront and cross-examine adverse witnesses serves symbolic and functional goals. First, the Confrontation Clause advances the perception of fairness by "ensuring that convictions will not be based on the charges of unseen and unknown – and hence unchallengeable – individuals." *Lee v. Illinois*, 476 U.S. 530, 540 (1986). Second, it promotes reliability in criminal trials. As this Court observed in *California v. Green*, 399 U.S. 149 (1970), confrontation

> (1) insures that the witness will give his statements under oath – thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

Id. at 158 (footnote omitted).

In *Ohio v. Roberts*, 448 U.S. 56 (1980), this Court set forth the general framework for determining when

incriminating statements, admissible under an exception to the hearsay rule, also satisfy the requirements of the Confrontation Clause. As this Court restated in *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139 (1990):

> "First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case . . . , the prosecution must either produce or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." . . . Second, once a witness is shown to be unavailable, "his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."

Id., 110 S.Ct. at 3146 (quoting *Roberts*, 448 U.S. at 65-66). With regard to this latter requirement, *Wright* clarified that in demonstrating the trustworthiness of such hearsay statements, a court may only consider those circumstances surrounding the making of the statement that rendered the declarant particularly worthy of belief, not the totality of circumstances that may have been proved at trial. *Id.* at 3148.

According to the foregoing analysis, there are two paradigms for analyzing the admissibility of hearsay statements for Confrontation Clause purposes. Under both, the Confrontation Clause generally requires the

proponent to show that the declarant is unavailable[2] and the statement bears adequate indicia of reliability. *Wright*, 110 S.Ct. at 3146. If the hearsay falls within a firmly rooted hearsay exception, reliability may be presumed. *Id.* If not, reliability must be shown from particularized guarantees of trustworthiness derived only from those circumstances surrounding the making of the statement and that render the declarant particularly worthy of belief. *Id.*

A. A POST-ARREST STATEMENT OF A NON-TESTIFYING ALLEGED ACCOMPLICE WHICH INCRIMINATES THE DECLARANT AND A CRIMINAL DEFENDANT DOES NOT CONSTITUTE A FIRMLY ROOTED HEARSAY EXCEPTION.

This Court uses the term "firmly rooted" to describe those hearsay exceptions which "rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of constitutional protection.' " *Ohio v. Roberts*, 448 U.S. at 66 (quoting *Mattox v. United States*, 156 U.S. 237, 244 (1895)). Stated differently, firmly rooted hearsay exceptions describe categorical situations that provide substantial guarantees of trustworthiness. *See White v. Illinois*, ___ U.S. ___, 112 S.Ct. 736, 742 (1992). "Admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight

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[2] This Court held in *United States v. Inadi*, 475 U.S. 387 (1986), that unavailability is not required when the hearsay statement is the out-of-court declaration of a co-conspirator.

accorded long-standing judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements." *Idaho v. Wright*, 497 U.S. 805, ___, 110 S.Ct. 3139, 3147 (1990).

In determining whether a particular hearsay statement falls within a "firmly rooted exception," this Court has looked to, *inter alia*, the length of time the exception has been recognized, *White*, 112 S.Ct. at 742 n.8 (exception for spontaneous declarations at least two centuries old); *Bourjaily v. United States*, 483 U.S. 171, 183 (1987) (co-conspirator hearsay exception first established in Supreme Court over a century and a half ago); the breadth of its acceptance, *id.*, and whether all types of statements which fall within the exception bear the requisite indicia of reliability. *See Wright*, 110 S.Ct. at 3147 (residual hearsay exception not firmly rooted because it accommodates *ad hoc* situations in which hearsay statements made); *Lee*, 476 U.S. at 544 n.5 (categorization of statements as simple "declaration against penal interest" describes too large a class for meaningful confrontation clause analysis).

Statements against penal interest, such as the ones Harris made against Williamson, do not fall within a firmly rooted hearsay exception. This Court has repeatedly emphasized the suspect nature of these statements and the grave threat they present to the reliability of the fact-finding process. *E.g., Lee*, 476 U.S. at 541, 544-45; *Bruton v. United States*, 391 U.S. 123, 136, 141-42 (1968); *Douglas v. Alabama*, 380 U.S. 415, 419 (1965); *see Chambers v. Mississippi*, 410 U.S. 284, 299-300 (1973). Indeed, in *Lee*, the majority decision summarily rejected Illinois's assertion that the statements at issue, parts of an accomplice's

confession which incriminated the defendant, bore sufficient indicia of reliability because they fell within a firmly rooted hearsay exception: "We reject respondent's categorization of the hearsay involved in this case as a simple 'declaration against penal interest.' That concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as involving a confession by an accomplice which incriminates a criminal defendant." *Id.* at 544 n.5. *Accord Bruton v. United States*, 391 U.S. 123, 128 n.3 (1968). Even the dissenting Justices in *Lee*, though of the opinion that the hearsay exception for declarations against interest is firmly established, recognized that accomplice confessions which incriminate a defendant do not fit squarely within it:

> Indeed, accomplice confessions ordinarily are untrustworthy precisely because they are *not* unambiguously adverse to the penal interest of the declarant. It is of course against one's penal interest to confess to criminal complicity, but often that interest can be advanced greatly by ascribing the bulk of the blame to one's confederates. It is in circumstances raising the latter possibility – circumstances in which the accomplice's out-of-court statements implicating the defendant may be very much in the accomplice's penal interest – that we have viewed the accomplice's statements as "inevitably suspect."

Id. at 552-53 (Blackmun, J., dissenting with whom Powell and Rehnquist, J.J., and Burger, C.J., concurred) (citation omitted). Thus, it appears that this Court has already rejected the notion that hearsay statements like those of Harris fall within a firmly rooted hearsay exception. The fact that they do not is well supported.

Although the hearsay exception for statements against interest has long been recognized, the inclusion of statements against penal interest is relatively recent. Throughout the 18th Century and into the early part of the 19th Century it was customary to admit statements against pecuniary or proprietary interest as an exception to the hearsay rule. 5 J. WIGMORE, EVIDENCE § 1476 at 350 (Chadbourn rev. 1974). However, in 1844, in the *Sussex Peerage Case*,[3] the House of Lords specifically held that the hearsay exception for declarations against interest did not cover statements subjecting the declarant to criminal liability. *Id.* at 351 n.6; E. CLEARY, MCCORMICK ON EVIDENCE § 278 at 822-23 (3d ed. 1984). In *Donnelly v. United States*, 228 U.S. 243 (1913), this Court relied on the *Sussex Peerage Case* and the "great and practically unanimous weight of authority" in holding the out-of-court confession of an unavailable declarant inadmissible. *Id.* at 274. This rule was generally followed in this country well into the 20th Century. 5 J. WIGMORE, *supra*, at 352-58 and n.9; MCCORMICK ON EVIDENCE, *supra*, at 823. This Court noted in *Chambers v. Mississippi*, 410 U.S. 284 (1973), that most states disallowed statements against penal interests from the general "declarations against interest" exception to the hearsay rule. *Id.* at 299.

The Advisory Committee Notes to the proposed 1972 Federal Rules of Evidence reflect that the common law refused "to concede the adequacy of a penal interest" to satisfy the traditional "statement against interest" exception. Fed.R.Evid. 804(b)(3), Notes of Advisory Committee on 1972 Proposed Rules, West's Federal Criminal Code

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[3] 11 Cl. & F.85, 8 Eng.Rep. 1034 (1844).

and Rules at 285 (1993). The House Committee on the Judiciary noted that the rule eventually enacted as 804(b)(3) would "expand the hearsay limitation from its present federal limitation to include statements subjecting the declarant to criminal liability. . . . " H.R.REP.NO. 650, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.CODE CONG. & ADMIN. NEWS 7075, 7087. In expanding this limitation to include statements against penal interest, the House Committee specifically amended the draft of the rule before it to exclude "a statement or confession offered against the accused in a criminal case, made by a co-defendant or other person implicating both himself and the accused." *See id.* This addition was not deleted until later drafts and then only because it was deemed unnecessary to codify prevailing constitutional evidentiary principles. S.REP.NO.1277, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7068. It has been authoritatively noted that in context, the reasoning for the deletion means that the Rule should be interpreted to include this language. 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 804(b)(3)[03] at 804-158 (1993).

Notwithstanding expansion of the rule excepting statements against interest from the hearsay rule to include statements against penal interest, the question of whether statements or confessions of a co-defendant which implicate an accused fall within this exception remains highly controversial. Many of the federal circuit courts of appeals have taken the view that inculpatory confessions of non-testifying accomplices are inadmissible because they fail to even meet Rule 804(b)(3)'s requirement that the statements be against the declarants' penal interest. *E.g., United States v. Magna-Olvera*, 917 F.2d

401, 407-09 (9th Cir. 1990); *United States v. Johnson*, 802 F.2d 1459, 1464-65 (D.C. Cir. 1986); *Fuson v. Jago*, 773 F.2d 55, 60-61 (6th Cir. 1985); *United States v. Riley*, 657 F.2d 1377, 1383-85 (8th Cir. 1981), *cert. denied*, 459 U.S. 111 (1983); *United States v. Palumbo*, 639 F.2d 123, 127-28 (3d Cir.), *cert. denied*, 454 U.S. 819 (1981); *United States v. Sarmiento-Perez*, 633 F.2d 1092, 1102 (5th Cir. Unit A 1981), *cert. denied*, 459 U.S. 834 (1982); *United States v. Lilley*, 581 F.2d 182 (8th Cir. 1978). Other courts continue to exclude these statements for their failure to bear adequate indicia of reliability. *E.g., United States v. Flores*, 985 F.2d 770, 780-83 (5th Cir. 1993); *United States v. Gomez-Lemos*, 939 F.2d 326, 329-32 (6th Cir. 1991); *United States v. Vernor*, 902 F.2d 1182, 1187 (5th Cir.), *cert. denied*, 111 S.Ct. 301 (1990); *United States v. Boyce*, 849 F.2d 833, 836-37 (3d Cir. 1988); *United States v. Alvarez*, 584 F.2d 694, 701-02 (5th Cir. 1978). The continuing reluctance of the federal circuit courts of appeals to admit these hearsay statements highlights the uncertainty of this hearsay exception as applied to inculpatory confessions of accomplices and belies any notion that it is firmly rooted.

Even since the promulgation of the Federal Rules of Evidence, the states have not uniformly embraced the notion that the hearsay exception for statements against interest include post-arrest statements of accomplices which implicate defendants. The evidentiary codes of several states specifically exclude such statements.[4] Other

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[4] Ark.Stat. § 28-1001; Me.R.Evid. 804(b)(3) (1993); Nev.Rev.Stat.tit. 4 § 51.345; N.D.R.Evid. 804(b)(3); Vt.R.Evid. 804(b)(3); *accord* Uniform Rule of Evidence 804(b)(3); *cf.* Fla.Stat. § 90.804(2)(C) (1990) (provision disallowing statements

states have excluded these statements through judicial opinions.[5] The states' divergent treatment of the issue further indicates that the hearsay exception allowing introduction of post-arrest statements of alleged accomplices which implicate criminal defendants is not firmly rooted.

Cases from the First, Second, Seventh, Tenth, and Eleventh Circuit Courts of Appeals have held that the against-penal-interest exception to the hearsay rule is firmly rooted. *United States v. Seeley*, 892 F.2d 1, 2 (1st Cir. 1989); *United States v. Katsougrakis*, 715 F.2d 769, 775 (2d Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); *United States v. York*, 933 F.2d 1343, 1362-64 (7th Cir.), *cert. denied*, 112 S.Ct. 321 (1991); *Jennings v. Maynard*, 946 F.2d 1502, 1505-06 (10th Cir. 1991); *United States v. Taggart*, 944 F.2d 837, 840 (11th Cir. 1991). These decisions are not persuasive and are in error. *Katsougrakis* was decided before this Court's authoritative decision to the contrary in *Lee*. A later panel of the Second Circuit has questioned its vitality. *United States v. Bakhtiar*, 994 F.2d 970, 977-78 (2d Cir. 1993). *See Latine v. Mann*, 830 F.Supp. 774, 780-81 (S.D.N.Y. 1993) (statements against penal interests *not* within firmly rooted hearsay exception). *Seeley* simply relied on *Katsougrakis* to support its conclusion. *See*

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inculpating both declarant and accused under statement against interest exception dropped). *See generally* WEINSTEIN'S EVIDENCE, *supra*, at 804-164-174.

[5] *E.g.*, *People v. Leach*, 15 Cal.3d 419, 124 Cal.Rptr. 752, 541 P.2d 296 (1975), *cert. denied*, 424 U.S. 926 (1976); *People v. Nally*, 134 Ill.App.3d 865, 480 N.E.2d 1373 (1985); *State v. Hansen*, 312 N.W.2d 96 (Minn. 1981); *State v. Hughes*, 244 Neb. 810 (1993); *State v. Abourezk*, 359 N.W.2d 137 (S.D. 1984); *State v. St. Pierre*, 759 P.2d 383 (Wash. 1988).

United States v. Innamorati, 996 F.2d 456, 474 n.4 (1st Cir. 1993) (citing *York* for proposition that most courts have concluded declaration against interest exception is firmly rooted).

The Seventh Circuit in *York* held that the declaration against penal interest exception is firmly rooted. *Id.*, 933 F.2d at 1363. In doing so it struggled, but failed, to distinguish this Court's decision in *Lee* and its own prior decision in *Morrison v. Duckworth*, 929 F.2d 1180 (7th Cir. 1991), which held that statements inculpating a third party "do not come within an established hearsay exception." *Id.* at 1181 n.2; *see United States v. Flores*, 985 F.2d 770, 776 n.13 (5th Cir. 1993) (criticizing reasoning of *York* and other cases finding penal interest exception firmly rooted). Even though the court in *York* held that the penal interest exception was firmly rooted, it inconsistently found the need to evaluate the specific circumstances surrounding the statements it was considering. *Id.*, 933 F.2d at 1362-64. *York* might be best read to hold that the against-penal-interest exception is firmly rooted as to only those statements not made to limit the declarant's exposure. *Bakhtiar*, 994 F.2d at 977.

The Tenth and Eleventh Circuit decisions which seem to conclude that the against penal interest exception is firmly rooted are also unconvincing. The Tenth Circuit in *Jennings* and the Eleventh Circuit in *Taggart* seemed to focus on how well the hearsay statements each court was considering, fit within the against-penal-interest hearsay exception, instead of how well established this hearsay exception is according to the relevant factors this Court has identified. *Jennings*, 946 F.2d at 1505-06; *Taggart*, 944 F.2d at 940. The courts in *Jennings* and *Taggart* also found

the need to evaluate the circumstances surrounding the making of the hearsay statements to determine reliability. This would have been unnecessary had the hearsay exception been firmly rooted. *Id.* Thus, none of these decisions are persuasive that the against-penal-interest hearsay exception is firmly rooted.[6]

B. HARRIS'S POST-ARREST STATEMENTS IMPLICATING WILLIAMSON DID NOT BEAR ADEQUATE INDICIA OF RELIABILITY TO RENDER THEM ADMISSIBLE UNDER THE CONFRONTATION CLAUSE.

In a solid line of cases, this Court has recognized that the "truthfinding function of the Confrontation Clause is *uniquely* threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination." *Lee*, 476 U.S. at 541 (emphasis added). In *Douglas v. Alabama*, 380 U.S. 415 (1965), this Court reversed the defendant's conviction because a confession purportedly made by the non-testifying accomplice, which implicated the defendant, was read to the jury by the prosecutor. The Court held that the defendant's "inability to cross examine [the accomplice] as to the alleged confession plainly denied him the right

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[6] The best reasoned decisions, consistent with the analytical framework suggested by the decisions of this Court, are the ones that have found that the against-penal-interest hearsay exception is *not* firmly rooted. *Flores*, 985 F.2d at 778-80; *United States v. Vernor*, 902 F.2d 1182, 1186-87 (5th Cir.), *cert. denied*, 498 U.S. 922 (1990); *Olson v. Green*, 668 F.2d 421, 427 n.11 (8th Cir.), *cert. denied*, 456 U.S. 1009 (1982); *Latine v. Mann*, 830 F.Supp. 774, 780-81 (S.D.N.Y. 1993).

of cross-examination secured by the Confrontation Clause." *Id.* at 419. The holding was premised on the understanding that "when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination." *Lee*, 476 U.S. at 451.

Likewise, in *Bruton v. United States*, 391 U.S. 123 (1968), this Court reversed the defendant's conviction because the jury heard his non-testifying co-defendant's confession which implicated him. Despite an instruction limiting consideration of this statement to the co-defendant, this Court concluded that the introduction of the co-defendant's uncross-examined confession violated the defendant's right of confrontation. *Id.* at 135. After noting the "inevitably suspect" credibility of an accomplice's inculpatory statements about his alleged co-conspirator, this Court declared that the unreliability of such a confession is "intolerably compounded" when the alleged accomplice "does not testify and cannot be tested by cross-examination." *Id.* at 136.

In its most recent case, this Court held in *Lee v. Illinois* that the trial judge's reliance upon the post-arrest confession of a non-testifying accomplice in sustaining the defendant's conviction was reversible error. In a murder case in which only one bullet had been fired, the accomplice fingered the defendant as the triggerman. The Court recognized that due to a co-conspirator's "strong motivation to implicate the defendant" in order "to shift or spread blame, curry favor, avenge himself, or divert attention to another," a co-conspirator's post-arrest statements about the defendant's involvement in the crime

must be viewed with "special suspicion." *Id.*, 476 U.S. at 541, 545. "[O]nce partners in crime recognize that the 'jig is up,' they tend to lose any identity of interest and immediately become antagonists, rather than accomplices." *Id.* at 544-45. *Cf. Chambers v. Mississippi*, 410 U.S. 284, 299-300 (1973) (confessions of criminal activity often motivated by extraneous considerations and, thus, not as reliable as statements against pecuniary or proprietary interest).

Turning to the facts of the instant case, not only did the government fail to demonstrate that Harris's hearsay statements had particularized guarantees of trustworthiness, but the circumstances affirmatively established their untrustworthiness. Foremost, declarant Harris's statements were made to the police while in custody. He was arrested immediately following the seizure of the cocaine from his vehicle. Tr.94. He gave his telephonic statement to agent Walton after being in custody approximately one hour. J.A. 33, 52. He gave his second statement to Walton after being in custody for approximately six and one-half hours. J.A. 22, 38, 43. The custodial setting of the interrogation undermined the reliability of the statements. *See Dutton v. Evans*, 400 U.S. 74, 87 (1970) (distinguishing inculpatory statement of declarant to fellow prisoner from those made "in the coercive atmosphere of official interrogation").[7]

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[7] *Accord United States v. Flores*, 985 F.2d 770, 780 (5th Cir. 1993); *United States v. Magna-Olvera*, 917 F.2d 401, 409 (9th Cir. 1990); *United States v. Boyce*, 849 F.2d 833, 836-37 (3d Cir. 1988); *United States v. Riley*, 657 F.2d 1377, 1384 (8th Cir. 1981); *United States v. Palumbo*, 639 F.2d 123, 127-28 (3d Cir. 1981); *United States v. Sarmiento-Perez*, 633 F.2d 1092, 1093, 1102-04 (5th Cir. Unit A 1981); *United States v. Oliver*, 626 F.2d 254, 261 (2d Cir. 1981); *United States v. Love*, 592 F.2d 1022, 1025 (8th Cir. 1979); *United States v. Bailey*, 581 F.2d 341, 345 (3d Cir. 1978); Notes of Advisory Committee on 1972 Proposed Rules, WEST'S FEDERAL CRIMINAL CODE AND RULES at 285 (1993).

Second, Harris's statements were most certainly not spontaneous, but instead were in response to police interrogation. The testimony makes clear that after being arrested and brought to the Dooley County Sheriff's office, Harris was interrogated by state and federal agents. J.A. 20, 25-26, 30, 36-37. He was questioned on the telephone by agent Walton at which time he gave one statement inculpating Mr. Williamson. He gave his second statements in response to further interrogation designed to set-up a controlled delivery of cocaine, at the Macon Marshal's Service office. Clearly, these were not the type of "spontaneous" statements made without conscious thought or deliberation that might partially support a ruling admitting them. *See White*, 112 S.Ct. at 742-43 (spontaneous out-of-court declaration may carry more weight with jury than in-court statement under oath); *Chambers v. Mississippi*, 410 U.S. 284, 300 (1973) (spontaneity of statement provided indicia of reliability); *Dutton*, 400 U.S. at 88-89 (spontaneity of statement provided indicia of reliability).[8]

A third significant factor tending to negate the reliability of Harris's post-arrest statements is that they were made under circumstances in which Harris had a strong incentive to "shift or spread blame, curry favor, avenge himself, or divert attention to another." *Lee*, 476 U.S. at 545. To be sure,

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[8] *Accord Palumbo*, 639 F.2d at 133; *Sarmiento-Perez*, 633 F.2d at 1102.

the jig was up. Harris had been arrested and was advised he was facing federal prosecution. He had been caught cold possessing 19 kilograms of cocaine. He was also told before each interrogation session that any cooperation would be relayed to the prosecutor, J.A. 25-26, ostensibly for him to receive some benefit.[9] Thus, Harris had a tremendous incentive to minimize his own role and shift blame to someone else, in this case Williamson. Harris also had a strong incentive to avenge himself: he was in custody while Mr. Williamson was free.

Harris apparently acted to advance these selfish interests. After a full taste (six and one-half hours) of police custody, he advised his captors that he was a mere courier and the cocaine found in his vehicle was acquired by Williamson, belonged to Williamson, and was intended to be delivered to Williamson. By describing Williamson as his principal and ascribing the bulk of the blame to him, Harris shifted blame, curried favor, avenged himself, and diverted attention to Williamson from himself. *Cf. United States v. Flores*, 985 F.2d 770, 782 (5th Cir. 1993) ("Taking on the full blame for a minor role in an offense, such as claiming to be a mere courier in a drug conspiracy, does little to demonstrate trustworthiness because the declarant still has the motive to shift the

[9] The government will undoubtedly argue that because the police did not offer a specific benefit to Harris in exchange for his cooperation, he was not motivated to curry favor with his interrogators. Petitioner submits that because Harris was left to fantasize about what benefit he might possibly secure, his incentive to curry favor was even greater than had the interrogators specified the limitations upon what benefit he might actually receive.

blame to others so as to receive a lesser penalty."). Statements made under these circumstances fail to justify any reasonable belief in their trustworthiness.[10]

Other circumstances surrounding Harris's statements further undermined their trustworthiness. During his interrogation, Harris gave at least two, if not three different stories concerning the events leading up to his arrest. J.A. 53-57. Although each of these statements tended to implicate Williamson, the material contradictions between them negated their trustworthiness. *See United States v. Cuthel*, 903 F.2d 1381, 1384 (11th Cir. 1990) (district court excluded out-of-court statements on ground statements were not sufficiently trustworthy in light of, *inter alia*, pattern of material inconsistency). Harris indicated his own lack of confidence in his statements by expressing concern that they not be electronically recorded. He balked when he was requested to provide a written statement. J.A. 24. His refusal to incriminate Williamson under oath at trial, despite having been granted use immunity, suggests Harris abandoned his post-arrest statements. Lastly, the custodial statements were made before Harris had any contact with an attorney or his family. *See Boyce*, 849 F.2d at 836. All of these circumstances, individually and cumulatively, vitiated the trustworthiness of Harris's custodial statements.

[10] *Accord Boyce*, 849 F.2d at 836 (nothing in record that indicated declarant was *not* motivated by a desire to curry favor with interrogating agents); *Riley*, 657 F.2d at 1384; *Palumbo*, 639 F.2d at 128; *Sarmiento-Perez*, 633 F.2d at 1102 (desire to curry favor, alleviate culpability, and for revenge might well have been motivation to misrepresent the role of others in the criminal enterprise); *Oliver*, 626 F.2d at 260; *Love*, 592 F.2d at 1026 ("strong incentive to speak whether it be truthfully or falsely").

The district court based its evidentiary ruling on two cases: *United States v. Robinson*, 635 F.2d 363 (5th Cir. Unit B), *cert. denied*, 452 U.S. 916 (1981), J.A. 31, and *United States v. Harrell*, 788 F.2d 1524 (11th Cir. 1986). J.A. 47-52. Both cases are materially distinguishable from the instant case and fail to support its ruling. In *Robinson*, the court rejected the appellants' challenge to the district court's admission of a co-conspirator's post-arrest statement. Concluding that corroborating circumstances sufficiently indicated the trustworthiness of the statement, the court considered the following facts: (1) the declarant was not in custody; (2) the declarant's statement was preceded by Miranda warnings; (3) the interrogating agents gave the declarant no reason to believe it would help him to inculpate others; (4) the declarant never attempted to shift the blame elsewhere; (5) the declarant's statement was judicially determined to have been knowing and voluntary; and (6) the truth of the declarant's statement was corroborated by the totality of the evidence introduced against the defendants at trial. *Id.*, 635 F.2d at 364.

By contrast, in the instant case, declarant Harris was in custody when he gave the inculpatory statements. Although agent Walton testified that the second statement was preceded by Miranda warnings, J.A. 20, 24, there was no evidence that the first statement was preceded by Miranda warnings. Unlike the declarant in *Robinson*, Harris's interrogator specifically advised him before both interrogations that any cooperation he provided would be made known to the prosecutor, implying that some benefit would be provided in exchange. J.A. 25-27. Harris's statements can only be interpreted as

shifting the blame for his criminal conduct to Williamson. Regarding the voluntariness of Harris's statements, though the record does not disclose the court's ruling on Harris's motion challenging the voluntariness of his statements, R.10, 13, 56, 57, 58, 60, this Court observed that a finding that a confession is voluntary has no bearing on the question of whether the confession was also free from any desire, motive, or impulse of the declarant to minimize the appearance of his own culpability and spread the blame to a third person. *Lee*, 476 U.S. at 544. *Accord United States v. Oliver*, 626 F.2d 254, 261 (2d Cir. 1980). Finally in *Idaho v. Wright*, 497 U.S. 805 (1990), this Court rejected the notion relied upon in *Robinson* that other evidence introduced at a defendant's trial can supply the corroboration of a statement necessary to pass muster under the Confrontation Clause. These factual and legal distinctions virtually nullify the precedential value of *Robinson* to the instant case.

The contrast between *Harrell* and the instant case is even more striking. In *Harrell*, the declarant gave the statement spontaneously to an undercover agent whom he believed was a confederate. *Id.*, 788 F.2d at 1525, 1527. Such spontaneous statements, when made to friends or confederates, are widely held to have special guarantees of trustworthiness. *See, e.g., Chambers*, 410 U.S. at 300; *Palumbo*, 639 F.2d at 133; *Sarmiento-Perez*, 633 F.2d at 1102. By contrast, Harris's hearsay statements were made during custodial interrogation to government agents and bore all the attendant characteristics of untrustworthiness. Also, as in *Robinson*, the court in *Harrell* relied upon independent evidence introduced at trial to support its

ruling upholding the district court's admission of statements against interest of unavailable declarants. *Wright* now prohibits consideration of such evidence to establish trustworthiness.

The foregoing analysis demonstrates the overwhelming unreliability of Harris's hearsay statements against Williamson. The admission of these statements violated Mr. Williamson's critical constitutional right to defend against the government's accusations: the right to confront the witnesses against him. Only through the crucible of rigorous cross-examination could Mr. Williamson have fully and fairly tested the credibility of Harris and the trustworthiness of the statements that so severely incriminated him. The denial of this right rendered Williamson's trial fundamentally unfair and requires reversal of his conviction.

C. A POST-ARREST STATEMENT OF A NON-TESTIFYING ALLEGED ACCOMPLICE WHICH INCRIMINATES THE DECLARANT AND A CRIMINAL DEFENDANT AND WAS ELICITED THROUGH CUSTODIAL INTERROGATION IS INHERENTLY UNRELIABLE. ITS INTRODUCTION AT THE DEFENDANT'S SEPARATE TRIAL NECESSARILY VIOLATES THE CONFRONTATION CLAUSE.

This Court has expressed its reluctance to establish bright-line rules of constitutional criminal procedure. *E.g., Florida v. Wells*, 495 U.S. 1 (1990) (rejecting Florida Supreme Court's mechanical "all or nothing" interpretation of Fourth Amendment's limitations on inventory searches); *United States v. Sokolow*, 490 U.S. 1 (1989)

(rejecting Ninth Circuit's bright-line test for analyzing drug courier profile facts in assessing reasonable suspicion). However, the routine and devastating violation of confrontation rights that results from introduction of hearsay statements within the narrow but extremely common class represented by Harris's post-arrest custodial statements fully warrants such a rule of exclusion. This Court has consistently expressed its doubt about the trustworthiness of these hearsay statements in the strongest terms. *Lee*, 476 U.S. 530, 541-43 (1986); *Bruton v. United States*, 391 U.S. 123, 136 (1968); *Douglas v. Alabama*, 380 U.S. 415, 419 (1965). Although this Court, until now, has described them as being only "presumptively unreliable," *Lee* at 541, members of this Court have stressed that the presumption of unreliability is "weighty." *New Mexico v. Earnest*, 477 U.S. 648, 649 (1986) (Rehnquist, Powell, and O'Connor, J.J., and Burger, C.J., concurring in summary vacation of judgment).

In practice, this Court has never sanctioned admission into evidence of a hearsay statement falling within this narrow category. Indeed, the only reasonable interpretation of this Court's cases discussing the admission of these statements at joint trials of the non-testifying declarants and the inculpated co-defendants is that they are strictly inadmissible against the co-defendants. *See, e.g., Richardson v. Marsh*, 481 U.S. 200, 206 (1987); *Cruz v. New York*, 481 U.S. 186, 189-90, 193 (1987); *Parker v. Randolph*, 442 U.S. 62, 73-74 (1979); *Bruton v. United States*, 391 U.S. 123, 126-29 (1968). These cases would make little sense if the Confrontation Clause permitted such hearsay statements to be admitted against the incriminated co-defendant.

A *per se* bar against admission of these statements was included in the early drafts of Federal Rule of Evidence 804(b)(3). H.REP.NO. 93-650, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS p. 7075, 7090; S.REP. 93-1277, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS pp. 7051, 7068; 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 804(b)(3)[03] at 804-158 (1993). It was eliminated because the Senate believed, and the House ultimately concurred, that it was unnecessary to codify this constitutional rule. 4 J. WEINSTEIN, *supra*, at 804-158. Judge Weinstein has concluded in his authoritative treatise that "[i]n context, this means the Rule should be interpreted to include this language." *Id.*

This Court's decisions in other, related areas support establishing a bright-line rule of inadmissibility here. In *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court held that confessions elicited through custodial interrogation are *per se* inadmissible at trial if the interrogation is not preceded by an advisement and waiver of the rights to silence and counsel. This rule was established to protect against the coercive circumstances of custodial interrogation, and ensure the reliability of a trial's truth-seeking function. Despite widespread criticism based largely on the suppression of such potentially probative evidence, this Court has strictly adhered to the rule because of its efficacy in protecting the truthfinding function of trials and its significant ease of administration. *See Withrow v. Williams*, ___ U.S. ___, 113 S.Ct. 1745 (1993) (discussing purposes, benefits, and detriments of Miranda's bright-line rule). Likewise, in *Bruton*, this Court created a bright-line rule requiring prosecutors intending to introduce the

confession of a non-testifying defendant which incriminates a co-defendant to either sever the defendants (so the confession would not be admitted at the co-defendant's trial), sanitize the confession to remove any references to the co-defendant and have the jury instructed it cannot consider the non-testifying defendant's confession against the co-defendant, or not use the confession at the joint trial. The manifest purpose of the rule in *Bruton* also was to protect the integrity of the trial's truth-seeking function.

A bright-line rule of exclusion is necessary with regard to hearsay statements such as Harris's for all these same reasons. These statements are inherently unreliable. Absent a full opportunity to cross-examine the declarant, an incriminated defendant is denied the ability to effectively challenge their credibility, sift the conscience of the declarant, and demonstrate the statement's lack of trustworthiness to the jury. Such statements are typically the most damning evidence against a defendant; they are often the key to the entire prosecution. A bright-line rule excluding such statements would add invaluable safeguards to the trial's truthfinding function and would contribute substantially to the efficient administration of justice in the federal courts.[11]

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[11] *See United States v. Flores*, 985 F.2d 770, 780-83 and n.27 (5th Cir. 1993) (holding that introduction of statements of unavailable declarant at a defendant's trial, which were elicited through custodial interrogation and incriminated the defendant, categorically violates the Confrontation Clause); *United States v. Sarmiento-Perez*, 633 F.2d 1092, 1093 (5th Cir. Unit A 1981) ("the custodial confession of a non-testifying, separately tried conspirator/co-defendant, insofar as [it] directly impli-

II. HARRIS'S POST-ARREST STATEMENTS INCULPATING WILLIAMSON WERE INADMISSIBLE AS STATEMENTS AGAINST INTEREST UNDER FEDERAL RULE OF EVIDENCE 804(B)(3).

Analysis of the admissibility of Harris's post-arrest statements under Rule 804(b)(3) must begin with the recognition that they were hearsay. Hearsay is any "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed.R.Evid. 801(c). Harris's statements were introduced through the testimony of agent Walton. They were offered to prove the truth of the matters asserted, i.e., that Mr. Williamson possessed, and conspired to possess, the cocaine seized from Harris's automobile, and directed Harris's interstate travel for the purpose of carrying on the unlawful activity of distributing cocaine. Consequently, unless they fit within one of the codified exceptions, the statements were inadmissible. Fed.R.Evid. 802.

The statements were offered and admitted into evidence under Federal Rule of Evidence 804(b)(3), titled "Statement against interest." This exception to the hearsay rule applies to statements of unavailable declarants. Fed.R.Evid. 804(b). In relevant part it renders admissible "[a] statement which at the time of its making . . . so far tended to subject the declarant to . . . criminal liability, that a reasonable person in the declarant's position would

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cates an accused in the crime charged, . . . is [*per se*] inadmissible because it is not reliable or trustworthy evidence against the accused").

not have made the statement unless believing it to be true." The rule is silent with regard to inculpatory statements, i.e., statements of a declarant which inculpate the defendant. However, with regard to exculpatory statements, the rule further provides: "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

A. TO SECURE ADMISSION OF STATEMENTS IMPLICATING THE DECLARANT AND THE ACCUSED IN A CRIMINAL CASE, THE GOVERNMENT MUST ESTABLISH CORROBORATING CIRCUMSTANCES CLEARLY INDICATING THE TRUSTWORTHINESS OF THE STATEMENTS.

The Rule's legislative history, Committee Notes, and the weight of judicial authority support the conclusion that, to secure the admission of inculpatory statements under this rule, the government must not only demonstrate the unavailability of the declarant and that the statements were contrary to penal interests, but also that the statements satisfy the Confrontation Clause requirement that they be supported by a showing of particularized guarantees of trustworthiness. *See, e.g., Idaho v. Wright*, 497 U.S. 805, ___, 110 S.Ct. 3139, 3148 (1990); *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). As explained above, the House Judiciary Committee initially amended the Rule to exclude from its purview a statement or confession of an accomplice implicating both himself and the accused. H.REP.NO. 93-650, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE

CONG. & ADMIN. NEWS pp. 7075, 7090. *See* 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 804(b)(3)[03] at 804-158 (1993). The addition was intended to codify *Bruton*. The Senate Judiciary Committee deleted this amendment explaining that it was unnecessary to codify this evolving constitutional principle. S.REP.NO. 93-1277, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS pp. 7051, 7068. The Conference Committee adopted the Senate's version. Notes of Conference Committee, H.REP.NO. 93-1597, WEST'S FEDERAL CRIMINAL CODE AND RULES at p. 288 (1993).

The exchange between the House, Senate, and Conference Committee clearly indicates an intent to superimpose this Court's evolving Confrontation Clause jurisprudence upon Rule 804(b)(3) with regard to inculpatory statements. *E.g., United States v. Alvarez*, 584 F.2d 694, 700 (5th Cir. 1978); *see United States v. Flores*, 985 F.2d 770, 774-77 (5th Cir. 1993); *United States v. York*, 933 F.2d 1343, 1361 (7th Cir. 1991). Although this Court has been careful "not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements, *Idaho v. Wright*, 497 U.S. 805, ___, 110 S.Ct. 3139, 3146 (1990), it has long recognized that "hearsay rules and the Confrontation Clause are generally designed to protect similar values . . . and stem from the same roots." *White v. Illinois*, ___ U.S. ___, ___ 112 S.Ct. 736, 741 (1992) (quoting *California v. Green*, 399 U.S. 149, 155 (1970) and *Dutton v. Evans*, 400 U.S. 74, 86 (1970)). *See generally Ohio v. Roberts*, 448 U.S. at 66 n.9 (noting complexity of reconciling Confrontation Clause and hearsay rules). This approach avoids the unnecessary confusion that would arise if the Rule

adopted one standard for admissibility and this Court demanded adherence to a different standard under the Sixth Amendment. *York*, 933 F.2d at 1361.

In *Ohio v. Roberts*, 448 U.S. 56 (1980), this Court examined the parameters of the Confrontation Clause in determining the admissibility of an unavailable declarant's sworn testimony elicited at the defendant's preliminary hearing. *Id.* at 58-63. After noting the essential value of a face-to-face confrontation between accuser and accused to the integrity of the factfinding process, the Court held that the Constitution forbids admission into evidence of hearsay statements of unavailable declarants unless they are shown to bear "particularized guarantees of reliability." *Id.* at 63-66. This Court's Confrontation Clause jurisprudence continues to adhere to this general requirement. *E.g., Wright*, 110 S.Ct. at 3146. Whether one articulates the test as requiring "corroborating circumstances clearly indicat[ing] the trustworthiness of the statement," Fed.R.Evid. 804(b)(3) (applicable to exculpatory statements), or requiring a showing of "particularized guarantees of reliability," *e.g., Roberts* at 66, in addition to the unavailability of the declarant and a statement contrary to the declarant's penal interests, to secure admission of an inculpatory hearsay statement under Rule 804(b)(3), the proponent must, in addition, make a heightened showing of trustworthiness.[12] In the interests

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[12] The First, Second, Third, Fifth, Seventh, Eighth, and Eleventh Circuit Courts of Appeals require that, to secure admission of an inculpatory statement under Rule 804(b)(3), the statement must be corroborated by circumstances clearly indicating its trustworthiness. *E.g., United States v. Seeley*, 892 F.2d 1, 2 (1st Cir. 1989) (citing *Alvarez* with approval); *United States v.*

of simplicity, consistency, and ease of judicial administration, this Court should require the government to establish "corroborating circumstances clearly indicating the trustworthiness of the statement" to secure admission under Rule 804(b)(3).

B. HARRIS'S POST-ARREST STATEMENTS IMPLICATING WILLIAMSON WERE INADMISSIBLE BECAUSE THEY WERE NOT AGAINST HARRIS'S PENAL INTEREST.

The justification for admitting hearsay declarations against interest, notwithstanding their lack of the conventional indicia of reliability, i.e., declarant under oath, subject to cross-examination, available for fact-finder to assess demeanor and credibility, is that a person is unlikely to fabricate a statement against his own interest at the time it is made. *E.g., Chambers v. Mississippi*, 410 U.S. 284, 298-99 (1973). As Federal Rule of Evidence

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Katsougrakis, 715 F.2d 769, 775 (2d Cir. 1983); *United States v. Oliver*, 626 F.2d 254, 260 (2d Cir. 1980); *United States v. Palumbo*, 639 F.2d 123, 128 n.5, 131 (3d Cir. 1981); *United States v. Brainard*, 690 F.2d 1117, 1124 (4th Cir. 1982); *United States v. Flores*, 985 F.2d 770, 774 n.10 (5th Cir. 1993); *United States v. Alvarez*, 584 F.2d 694, 701 (5th Cir. 1978); *United States v. Harty*, 930 F.2d 1257, 1262-3 (7th Cir. 1991) (citing *Alvarez* with approval); *United States v. Garcia*, 897 F.2d 1413, 1420 (7th Cir. 1990); *United States v. Riley*, 657 F.2d 1377, 1383, 1385 (8th Cir. 1981) (citing *Alvarez* with approval); *United States v. Taggart*, 944 F.2d 837, 840 (11th Cir. 1991). The Ninth Circuit has specifically reserved judgment on whether, when admission of inculpatory statements is sought, Rule 804(b)(3) requires a demonstration of corroborating circumstances. *See, e.g., United States v. Williams*, 989 F.2d 1061, 1068 (9th Cir. 1993).

804(b)(3) specifically requires, to be admissible the hearsay statement must be one "that a reasonable person in the declarant's position would not have made . . . unless believing it to be true."

The difficulty in applying Rule 804(b)(3)'s "statement against interest" requirement to Harris's hearsay statements is that Harris's declarations contained both self-serving (shifting the blame to Williamson and characterizing him as the principal) and disserving (acknowledging complicity) facts. As Judge Weinstein has indicated in his treatise, Rule 804(b)(3) is silent about this "most troublesome" aspect of the declaration against interest exception. WEINSTEIN'S EVIDENCE, *supra*, ¶ 804(b)(3)[02] at 804-150-51. In McCormick's treatise on evidence, three methods of handling these types of hearsay statements are recognized:

> First, admit the entire declaration because part is disserving and hence by a kind of contagion of trustfulness, all will be trustworthy. Second, compare the strength of the self-serving interests and the disserving interest in making the statement as a whole, and admit it all if the disserving interest preponderates, and exclude it all if the self-serving interest is greater. Third, admit the disserving parts of the declaration, and exclude the self-serving parts.

E. CLEARY, MCCORMICK ON EVIDENCE § 279 at 677 (2d ed. 1972).[13] McCormick's treatise gave its stamp of approval

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[13] In the 1984 Third Edition to MCCORMICK ON EVIDENCE, the discussion about the three methods of handling declarations containing self-serving and disserving facts has been dropped.

to the third method: "The third solution seems the most realistic method of adjusting admissibility to trustworthiness, where the serving and disserving parts can be severed." *Id.* *Accord* WEINSTEIN'S EVIDENCE, *supra*, ¶ 804(b)(3)[03] at 804-160 ("fact that part of the statement was against penal interest does not sufficiently establish trustworthiness"), 163 ("Because of the dangers involved, exclusion should almost always result when a statement against penal interest is offered *against* an accused.").

In *Lee v. Illinois*, 476 U.S. 530 (1986), the majority of the Court clearly placed its imprimatur on McCormick's third approach, excluding the self-serving portions of the declaration. The majority stated: "As we have consistently recognized, a co-defendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the co-defendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another." *Id.* at 545. It would appear that even the dissenting Justices would adopt this approach. In reconciling the Court's "customary" approach of treating the confessions of co-defendants

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The section still notes the "controversial" issue concerning "contextual or related statements." The new text indicates that in civil cases, "to admit the critical related statement or part of the statement is acceptable, even though not itself against interest, if it is closely enough connected in neutral as to interest." *Id.* at § 279 at 825. The section goes on to note that in criminal cases, judicial scrutiny has been more exacting: "[W]hen the statement is offered by the prosecution to inculpate the accused, an even stricter approach is sometimes found . . . requir[ing] rejection of any part or related statement not in itself against interest." *Id.* at 825-826 (footnote omitted).

with suspicion, with their assessment that the inculpatory portion of the declarant's confession was sufficiently trustworthy to meet Confrontation Clause concerns, the dissenting Justices stated:

> It is of course against one's penal interest to confess to criminal complicity, but often that interest can be advanced greatly by ascribing the bulk of the blame to one's confederates. It is in circumstances raising the latter possibility, circumstances in which the accomplice's out-of-court statements implicating the defendant may be very much in the accomplice's penal interest – that we have viewed the accomplice's statements as "inevitably suspect."

Id. at 552-53 (Blackmun, Powell, and Rehnquist, J.J., and Burger, C.J., dissenting).

This third approach has been employed in many federal appellate court decisions to support a conclusion that the inculpatory portion of a co-defendant's confession does not meet the "against penal interest" requirement of Rule 804(b)(3). In *United States v. Magna-Olvera*, 917 F.2d 401 (9th Cir. 1990), the court reversed the district court's finding that the post-arrest statements of a co-conspirator implicating the defendant in a drug conspiracy qualified for admission under Rule 804(b)(3). The court concluded that the statements were not sufficiently against the declarant's interest because they were made under custody, in an attempt to curry favor, upon the government's suggestion of penal benefit for the cooperation, and because the statements trivialized the declarant's role in the drug conspiracy by identifying the defendant as the "kingpin." *Id.* at 409.

In *United States v. Palumbo*, 639 F.2d 123 (3d Cir.), *cert. denied*, 454 U.S. 819 (1981), the court also reversed the defendant's conviction for conspiracy to possess with intent to distribute cocaine, based on the erroneous admission of a co-conspirator's post-arrest hearsay statements which implicated the defendant. Upon arrest, and again before the grand jury, the accomplice stated she received the cocaine found on her person at the time of her arrest from Palumbo. When the accomplice claimed she could not recall the source of the cocaine at trial, the government introduced the accomplice's hearsay statements through the arresting officer. *Id.* at 125-26. Concluding that these hearsay statements were not within the exception for declarations against interest, the court noted that the accomplice's identification of the defendant as the source of the cocaine occurred only after the drugs had been found on her person by police. *Id.* at 128. Although the statement, technically, could have been used to support a conspiracy or possession conviction against the declarant, "[t]he legal implications of her statement may well have been unknown to her." *Id.* The court also found significant that the statement was made in police custody, in response to police questioning, circumstances under which the arrestee's motivation may well have been to curry favor with the authorities. *Id.*

In *United States v. Riley*, 657 F.2d 1377 (8th Cir. 1981), *cert. denied*, 459 U.S. 111 (1983), the court also reversed the defendant's conviction based on its conclusion that the declarant's hearsay statement, though ostensibly against interest, was not in fact against her interest under all the surrounding circumstances at the time it was made. *Id.* at 1385. The court extensively reviewed the

applicable cases, treatises, law review commentaries, and rationale underlying the exception. *Id.* at 1381-84. To support its decision, the court noted that the statement was made in response to custodial interrogation and that, because she had been told a conviction might jeopardize the custody of her child, the declarant may well have believed it was in her best interest to make a statement implicating her co-defendant to ingratiate herself with the authorities. *Id.* at 1384. Additionally, the crime to which the declarant confessed was less serious than the one in which she implicated the defendant. *Id.* Thus, numerous decisions, for good reason, have found that the inculpatory portions of accomplice post-arrest statements which are both self-serving and disserving are not, in fact, against the declarant's interests under Rule 804(b)(3) and are inadmissible under Rule 802. *Accord Fuson v. Jago*, 773 F.2d 55, 60-61 (6th Cir. 1985); *United States v. Love*, 592 F.2d 1022, 1025-26 (8th Cir. 1979) ("it may have appeared to [declarant] that her best chance of being released promptly was to make a statement implicating someone else"); *United States v. Lilley*, 581 F.2d 182, 188 (8th Cir. 1978) ("restriction advocated by McCormick excluding portions of statements which are not against the declarant's interest is in keeping with the reasoning behind the 804(b)(3) exception to the hearsay rule").

Using the cited authorities as guidelines, it is apparent that Harris's post-arrest statements were not against penal interest within the meaning of Rule 804(b)(3). It cannot be said "that a reasonable person in [Harris's] position would not have made the statement[s] unless believing [them] to be true." *Id.* The overall tenor of the

statements was self-serving. While the statements certainly implicated Harris in a narcotics offense, they only confirmed what was already obvious to the police from the discovery of the cocaine in his vehicle: Harris was in possession of the cocaine discovered in the trunk. Much more significantly, however, Harris's statements demonstrated a concerted effort to minimize his role in the offense and to shift the blame to Williamson. In each of Harris's statements, he characterized his role as a courier, a person following someone else's directions and concerned only with transportation of the cocaine. By contrast, in each of the statements he characterized Williamson as the principal, the person directing the operation who acquired, owned, and was the intended recipient of, the cocaine. He ascribed the bulk of the blame to Williamson.

The factual setting of Harris's statements gave rise to the strongest motivation to misrepresent the truth in order "to shift or spread blame, curry favor, avenge himself, or divert attention to another. . . ." *Lee v. Illinois*, 476 U.S. at 545. At the time he gave his first statement, he had already been in custody for an hour and knew full well that he was in the worst possible trouble. He was specifically advised that any cooperation he gave would be made known to the prosecutor. Harris's motive and opportunity to falsify his custodial statements could not have been greater. Thus, the portions of Harris's statements implicating Williamson were entirely self-serving. Under a strict test requiring exclusion of all self-serving parts of a declarant's post-arrest statements, these statements should have been excluded. Even under a more moderate test requiring comparison of the strength of

Harris's self-serving interest and his disserving interest, his self-serving interest predominated requiring a finding under Rule 804(b)(3) that his statements were not, in fact, against his penal interest.

C. HARRIS'S POST-ARREST STATEMENTS IMPLICATING WILLIAMSON WERE INADMISSIBLE BECAUSE THE GOVERNMENT FAILED TO ESTABLISH CORROBORATING CIRCUMSTANCES CLEARLY INDICATING THEIR TRUSTWORTHINESS.

As is argued in section II A, *supra*, the legislative history of Rule 804(b)(3) dictates that this Court's applicable Confrontation Clause jurisprudence must be overlaid upon Rule 804(b)(3). That jurisprudence requires that, at a minimum, to secure admission of hearsay statements ostensibly against the declarant's penal interest, the government must establish that the hearsay bears "particularized guarantees of trustworthiness." *E.g.*, *Wright*, 110 S.Ct. at 3146.[14] As is argued in section I B, *supra*, this Court decision in *Wright* limits the government in establishing its circumstantial indicia of reliability to those circumstances that immediately surround the making of the statement and that render the declarant particularly worthy of belief. *Id.*, 110 S.Ct. at 3148. It prohibits

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[14] Williamson has argued in section I A, *supra*, that to maintain consistency with the portion of Rule 804(b)(3) dealing with exculpatory statements, to secure admission of inculpatory statements, the government should bear the same burden of establishing corroborating circumstances clearly indicating the trustworthiness of the statements.

the government from attempting to establish trustworthiness based on extraneous facts and circumstances independent of the hearsay statement.

Analysis of the facts offered to establish the trustworthiness of the hearsay statements under Rule 804(b)(3) is identical to the analysis of the same circumstances under the Confrontation Clause. Section I B, *supra*. The same circumstances that failed to establish the trustworthiness of Harris's post-arrest hearsay statements under the Confrontation Clause are similarly inadequate to establish trustworthiness under the Rule.[15]

CONCLUSION

The judgment of the Eleventh Circuit Court of Appeals should be reversed and this matter should be remanded to the district court for a new trial.

Respectfully submitted,

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[15] The limitation on the circumstances to be considered under *Wright* make it unnecessary to consider the physical evidence seized from Harris's vehicle or the details of the testimony of the witness who claimed he had sold Williamson cocaine in the past. It is submitted that even were these circumstances to be considered, they would not meet the government's burden of establishing corroborating circumstances clearly indicating the trustworthiness of Harris's hearsay statements.